EQUITY IN REM.

PERHAPS the most important legal publication of the past year is a monograph, by Charles Andrews Huston,[1] which is published as the first volume of Harvard Studies in Jurisprudence. It is inscribed as a dissertation submitted to the faculty of Harvard Law School in compliance with the terms of the Research Scholarship, and is dedicated to Roscoe Pound, to whom, the author tells us in his preface, he is indebted for the suggestion of the field of investigation, for constant inspiration, and for concrete suggestion and criticism.

The thesis which gives the title to the work, and to which the first eighty-six pages are devoted, is, in the language of the preface, a plea for "an enlargement of the equity powers of American courts which will enable them to give a real effect to their decrees; for example, to transfer titles directly instead of by ordering a litigant to make the transfer." The frame of the argument is thus summarized in the preface: "This is no innovation. Such power exists in more or less perfect form in most of the states of the Union. Its operation is not a matter of conjecture, but can be observed over a period of more than a century of practice, and in a wide variety of social conditions. But some states, and it is believed the Federal jurisdictions also, lack this power. Moreover it nowhere exists fully for all cases and its need has become more apparent to-day because of a definite trend in our legislation aiming at a restriction of the contempt process which constitutes the original, and still here and there the only, enforcing agency of our courts of equity." These positions are convincingly maintained. An historical sketch of our remedial theory and practice, both at common law and in equity; an analysis of the present state of the law in England, in each of the states, and in the Federal courts; illustrations, taken from judicial records, of the inadequacy of the existing law; a study of Roman law and the law of continental Europe, which in itself will convince any lawyer that we have needlessly denied ourselves some of the most useful and convenient of legal remedies;—these materials are brought to bear upon the thesis with unanswerable force. The work is a model of constructive legal criticism. The author makes his point so decisively that we cannot doubt that legislative action, and, what

[1] The Enforcement of Decrees in Equity, by Charles Andrews Huston, S.J.D., Professor of Law in Stanford University, Research Scholar in Harvard Law School, 1912-1913: Cambridge, Harvard University Press, 1915. Pp. xxi, 189.

is quite as essential to a full realization of the remedial possibilities of the law, a more enlightened attitude of bench and bar, will follow.

The second part of the work enters upon ground more debatable. Its thesis is that the classical doctrine, that equitable estates and interests are merely rights *in personam* against the owner (trustee or quasi-trustee) of the *res,* has ceased to be true; that even while we have insisted that equity acts only *in personam,* and have, except for a few aberrant decisions,[2] consistently applied that doctrine in its procedural aspect, we have in effect, and with some recognition of the effect, come to treat equitable interests as true proprietary rights, as rights *in rem.* While there is no necessary connection between the two theses of the book, since, as Mr. Huston points out,[3] we may have, and do have, remedies *in rem* for the enforcement of rights *in personam,* and *vice versa,* yet the second thesis has an obvious bearing on the first, since, if the former be granted, the movement toward the extension of equitable remedies "is seen to fall into place as one step in the really universal movement to adjust procedure to the character of the rights to which it seeks to give effect."[4] At the same time, the second thesis has an independent value far beyond this. There are those who consider the question of the nature of equitable rights as a mere matter of pious opinion without practical importance. But every question of legal theory is of practical importance. We may, of course, state a doctrine to be thus and so, while we proceed to decide cases as if it were otherwise, but the results can be satisfactory only so long as every one misunderstands the doctrine in the same way.

The arguments in support of the classical theory of equitable rights are both historical and analytical. Of the historical argument, Mr. Maitland's treatment is typical.[5] Starting with the unquestionable position that the use was but a personal obligation upon the feoffee to uses, it is shown how the Chancellor granted the subpoena first against one and then another class of third hands who had acquired the *res* from the feoffee under such circumstances that their consciences were bound by the obligation. The trust succeeded the use and rested upon principles fundamentally the same. Equity, following the law, gave to cestui's interest an "internal character"—as regards duration, transmission, alienation—analogous to legal ownership; but this process did not, of course, affect its "external character"—as regards the persons against whom it was good—so

[2] See pp. 23 ff., 28 ff.
[3] P. 136.
[4] P. 153.
[5] Lectures on Equity, 112-121.

that this "external character" remained that of a mere right *in personam*. Behind this statement of the history of the trust, runs an implication that, since there has at no time been a conscious break with the past, the original theory must remain. This line of argument Mr. Huston meets by an historical analysis emphasizing the constant tendency toward "attenuation" of the trustee's powers, and "reifying" of the cestui's rights. He refers to a parallel process in the Roman law, by which equitable rights developed from rights *in personam* into rights *in rem*, and to the similar development, in our common law, of the rights of the bailor.[6] He explains the want of conscious recognition of the evolution of the trust by reference to the fact that this development "has been taking place at a time recent when compared with the parallel developments above adverted to, and so at a time when juristic conceptions had become stereotyped by being already formulated. In other words, the slow but steady change in the rights of cestui que trust from rights *in personam* against the trustee to rights *in rem* available generally has been lost from view because the nature of the rights had been authoritatively defined while they were still personal. The account of them given by Coke in the end of the sixteenth century is still repeated by the editors of our standard texts in the beginning of the twentieth century as an adequate formulation of the rights by which the law protects the interest of cestui que trust."[7] By an historical analysis following these lines, the author prepares us to find that the equitable interest has become a right *in rem*. Finally, as the latest chapter in the history of equity, Mr. Huston brings forward the case of *In re Nisbet and Pott's Contract*,[8] in which the Court of Appeal, upon the fullest consideration, held that an "equitable easement" is enforceable against a disseisor of the covenantor, and against purchasers with notice from the disseisor. This case would seem to strike down the classical theory that equitable interests are only available against the trustee or quasi-trustee, and those who claim through or under him (who, in other words, are in privity with him) and to give full sanction to the prevalent form of statement, that they are good against all the world except a bona fide purchaser. While the case

[6] Another analogy is to be found in the development of the rights of the mortgagor. Being, in England, merely equitable, his rights were at an earlier day unquestionably mere rights in personam. In this country, except for a few early decisions, he has been recognized as the owner at law, as well as in equity, which unquestionably gives him rights in rem. While this development is different from that under Mr. Huston's consideration, in that it involves the extension of equitable doctrine into the law, yet, in the larger view, the division of law and equity being but an historical accident, the process is the same.

[7] P. 88.

[8] [1905] 1 Ch. 391; [1906] 1 Ch. 386.

is not conclusive, upon its facts, as to the equitable interest being a proprietary interest, Mr. Huston shows, in an analysis of the opinions, that it was placed upon that theory by the court.[9]

The analytical argument is more involved. Mr. Langdell said,[10] "If equitable rights were rights *in rem* they would follow the *res* into the hands of a purchaser for value and without notice." The author clearly demonstrates that this reasoning is unsound. In one of the most interesting passages of the book,[11] he collates numerous familiar instances in which full legal ownership is cut off by bona fide purchase. Mr. Maitland recognized[12] that it is not an essential of a right *in rem* "that the person who has that right can never be deprived of it save by his own act," and he noticed sale in market overt and the Factors Act. "But," he says, "really there is a marked difference between the two cases—in that of the sale in market overt the buyer gets ownership, but we do not conceive that he gets it from the seller, for the seller never had ownership; while the rule about the effect of a purchase in rendering equitable rights unenforceable is based on this that the trustee has ownership, and transfers it to the purchaser, and that there is no reason for taking away from the purchaser the legal right which has thus been transferred to him." To this Mr. Huston replies[13] that "The point of comparison is that in all the cases cited rights can fail to operate against a particular individual and yet be none the less rights *in rem*. The question of the way in which the ownership of the property transferred comes to the purchaser is beside the point here." We agree that it is beside the point, but feel that Mr. Huston has not made this as clear as is desirable. There is implied in Mr. Maitland's argument a major premise which seems to have been, in his opinion, a principal support for the classical doctrine, but which Mr. Huston does not touch. Discussing broadly the relations of law and equity, Mr. Maitland says[14] "An examiner will sometimes be told that whereas the common law said that the trustee was the owner of the land, equity said that the cestui que trust was the owner. Well here in all conscience there seems to be conflict enough. Think what this would mean were it really true. There are two courts of co-ordinate jurisdiction —one says that A is the owner, the other says that B is the owner of Blackacre. That means civil war and utter anarchy. Of course

[9] P. 110 ff.
[10] 1 Harv. L. Rev. 60.
[11] P. 124.
[12] Lectures on Equity, 142.
[13] P. 126.
[14] Lectures on Equity, 17. See also p. 156.

the statement is an extremely crude one, it is a misleading and a dangerous statement—how misleading, how dangerous, we shall see when we come to examine the nature of equitable estates. Equity did not say that the cestui que trust was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the cestui que trust. There was no conflict here." Mr. Ames puts it thus,[15] "The trustee is the owner of the land, and, of course, two persons with adverse interests cannot be owners of the same thing." Accepting this position, the question of the way in which the ownership of the property comes to the purchaser is not beside the point, for, if he acquires it from the trustee, the trustee must have ownership, and, if the trustee has ownership, the cestui cannot have it. The position is, however, untenable. It proceeds upon the assumption that the only way to obviate a conflict between the claim that A has ownership and the simultaneous claim that B has ownership is to deny one of those claims *in toto*. But, is it not equally possible to say that both claims are good in part, each involving the use of the word "ownership" in a special sense—that the trustee has certain rights and powers which it is convenient to call "legal title," while cestui has certain other rights which it is convenient to call "equitable ownership," and that the rights of both are *in rem*? Instances are abundant of the application of the terms "title" and "ownership" to rights which are less than absolute ownership—the case of the owner of a reversion and that of the disseisor come readily to mind. But perhaps the closest analogy is furnished by the cases on mortgages in some of our states, where it is said that the mortgagee has a legal title but that the mortgagor also has a legal title.[16] These verbally conflicting propositions are harmonized by the qualification of each "title" as a limited title, the one involving certain of the elements of absolute ownership, the other involving the residue of those elements. Of course these cases reflect a poverty of technical terms, but, whatever else we say of them, we cannot deny that, under the name of title, both mortgagor and mortgagee have rights *in rem*. Nor can we say that the rights of these parties are in practical effect very different from the respective rights of mortgagor and mortgagee in England, where the whole legal title is in the latter and the former enjoys but an equitable estate. If, then, the parties both have rights *in rem* in Illinois, without anarchy resulting, may not the same be true in England? And, if this is true of mortgagor and

[15] Lectures on Legal History, 262.

[16] See Lightcap v. Bradley 186 Ill. 510; Howard v. Robinson, 5 Cush. (Mass.) 119; Woodside v. Adams, 40 N. J. L. 417; Martin v. Alter, 42 Oh. St. 94.

mortgagee, may it not be true also of cestui que trust and trustee? In truth, conflict between the two jurisdictions was only avoided by forbearance on both sides. As Mr. Maitland notes, there were occasional open conflicts, as when Coke was for indicting a man who sued for an injunction. And there was no reason why the Chancellor himself might not be indicted for obstruction of justice, and the Chief Justice imprisoned for contempt of court, but that the result would be disastrous and forbearance was therefore required. The forbearance was mutual. The law was not, perhaps, as frank as equity in admitting its concessions. It may have called the trustee the owner in terms more unqualified than those in which equity called cestui the owner, but, in permitting equity to strip the trustee of the fruits of ownership or of ownership itself, the law certainly made the more substantial concession. And, once the law has made the concession of permitting equity to take the property from the trustee, it makes no difference, so far as regards actual conflict of jurisdiction, whether equity takes it from him by action *in personam* or by action *in rem*. Nor is there any anomaly in the claim of proprietary rights for both trustee and cestui except in the fact that, unlike most cases of divided ownership, the respective claims were enforceable in different courts—an anomaly that is fast disappearing.

But Mr. Huston is not content with showing that the doctrine of bona fide purchase is not inconsistent with his thesis. He proceeds to demonstrate that some of the phenomena of that doctrine are consistent only with the "real" theory.[17] He relies upon the line of cases, clearly the weight of authority, which hold that a bona fide purchase of an equitable estate does not cut off pre-existing equities. To Mr. Ames, whose analysis of bona fide purchase[18] is the most exhaustive ever presented from the point of view of the classical theory of equitable estates, these cases are not all of one piece; some he finds to be consistent with that theory, others (the line of distinction we need not examine) are found to be inconsistent with that theory and are considered by him to be erroneous. It is also interesting to note that, while Mr. Ames's theory squares in result with many of the cases, he is forced to admit that these cases do not go upon his theory. In other words, Mr. Ames's position involves what Mr. Huston calls "a special interpretation" of the bona fide purchaser doctrine—one which is not announced in the cases. On the other hand, the cases which hold that the bona fide purchaser of an equity

[17] P. 116 ff., 144 ff.

[18] Lectures on Legal History, 253.

does not prevail do square exactly with the theory that equitable estates are proprietary rights in the *res,* since, if they are proprietary rights, they will, in the absence of any countervailing principle, rank in the order of time. And this is obviously the theory upon which they are rested by the courts. They are dealt with in terms of "pre-existing equitable ownership."

But bona fide purchase is not yet disposed of. Langdell, Ames and Maitland have given us a rationale of bona fide purchase based upon the theory that equitable estates are rights *in personam,* and if we were left without any logical explanation of the phenomena upon the predicate of the equitable estate being a proprietary interest, it would be difficult to accept the latter theory. Mr. Huston does not, however, leave us in this position. What he says upon this head is so interesting that we feel justified in quoting it at some length.[19] "The basis of the doctrine of bona fide purchaser is not a principle confined to its recognition in courts of equity, and availing to cut off equitable titles only, but one which runs through the whole fabric of modern law:—an effort to ensure security in commercial transactions and acquisitions by imposing certain responsibilities on owners of property with respect to that property as a price of legal protection to their interests in it. The French law in its doctrine, *Possession vaut titre,* has only gone one step farther in developing the idea that in a mercantile community, where exchanges are the most characteristic and significant feature of its economy, it is more important for the law to protect the dynamic institution of exchange by granting certain and safe acquisition of ownership than to protect the static institution of property by conferring security of title. *Caveat emptor* is being modified by the change in social conditions into *caveat dominus*: Let the owner take care in the selection and supervision of his agent; let him watch the conduct of his trustee, at the risk of losing his property rights through their wrong-doing, if the transaction they carry through is with a bona fide purchaser. * * * In the conflict of interests between owners and acquirers of certain special classes of property the free circulation of which is of particular business utility, the social importance of encouraging transactions, of 'preventing property from stagnating,' has resulted in legal protection of the interests of the bona fide purchaser even at the expense of the property rights of the previous owner. These special classes of property tend to become more numerous as a nation becomes more industrial and commercial in its economy, but they are as yet exceptional. Now,

[19] Pp. 127, 130, 134.

as we have already seen, the mere fact of bona fide purchase is insufficient, in the case of an equitable estate, to give the purchaser priority. He must also have completely acquired the legal title to the property in question, to enable him to assert his claim against the person beneficially entitled to it. In other words, equitable estates are at present not regarded as of the special sort as to which the encouragement of free exchange is of prime social importance. * * * Until a scientific system of property transfer has been constructed, the obtaining of the legal estate is the surest method of reaching certainty of ownership which the law permits. And practically there is much to be said for the continuance of a device which, however open to attack from the scientific point of view, actually does enable a bona fide dealer to assure himself of the soundness of his title, and to cut through, even though he cannot disentangle, the complications of conflicting equities."

Other features of equitable estates are relied on by the adherents of the classical theory—the want of any remedy for the equitable owner except that of personal decree; the availability of the personal decree even when the *situs* of the *res* is beyond the jurisdiction of the court; the want of a direct remedy against strangers; the power of the trustee to release obligations held in trust; the right of a third person who is sued upon a cause of action relating to the trust to set up a defense which is technically good against the trustee but inequitable as against the cestui, and, on the other hand, his inability to set off a claim against the cestui. These problems are all faced conscientiously by Mr. Huston[20] and shown to have no conclusive effect, though some of them have an unmistakable logical bearing, upon the theoretical question in hand. At the same time, some of these rules are shown to have been shaken by recent cases, and these later cases are, of course, relied upon by Mr. Huston as affirmatively supporting his thesis. Of these cases, the most important is *In re Nisbet and Pott's Contract,* referred to above.

The writer believes that Mr. Huston has made his point as to the nature of equitable rights. The question is not removed beyond the field of dispute, and we may be sure that the classical doctrine will continue to be advanced. It seems quite certain, however, that the opposite position will be accepted with increasing frequency. As the author shows, it fits in with the larger tendency of the time toward the fusing of law and equity. And it is the position which is suggested by the current phraseology, "equitable ownership," "equitable title," and the rest, and therefore the position which, even if it

[20] Pp. 136-144.

were unsound, would tend to prevail by force of professional ignorance, that potent factor in legal evolution. Nor is it merely a matter of leading terminology. Most of the rules concerning equitable estates, even those which Mr. Maitland sets aside as having to do with the "internal nature" of the trust, bear the same way, so that it takes all the finesse of an Ames or a Maitland to make the classical theory intelligible to the modern lawyer. If Mr. Huston shall but convince the more learned students of the law (and this he cannot fail to do) that his thesis is not logically inconsistent with the established rules, so that their resistance to the heterodox doctrine is weakened, then, even though he does not convince them that the classical doctrine is obsolete today, they will find that it is obsolete tomorrow.

We should not leave this book without adverting to the human element in the whole business. Mr. Huston's modest monograph is, of course, but the latest word in a dispute that has raged for centuries, and not always without rancour. In its latest phase it presents an issue between the generation of legal scholars that has just passed, Langdell, Ames and Maitland, and those who followed and worked with them, and a younger generation of which Mr. Pound is the most conspicuous figure. In one aspect, it presents an evolution within the Harvard Law School. But, over and beyond all this, if we concede that Mr. Huston has made his point, we cannot ignore that this places some of the most brilliant and most conscientious of our legal scholars of the past and of the present generation in precisely the position which Mr. Pound described as "holding our taught tradition fast to the well worn path and fighting an obstinate retreat against development in new directions."[21] Nor can the rest of us who call ourselves scientific students of the law escape the indictment, for who of us has not ranged himself with Ames and Maitland and fought in their rear guard? And this suggests again the ever-present danger to which Mr. Maitland himself pointed, in the observation that taught law is tough law.[22] Against this danger, there is but one guard—to "bestir ourselves to the end that its toughness be that of living tissue, not that of dead fibre."[23]

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[21] Reports Am. Bar Assn. 1912, p. 996.
[22] Records of Lincoln's Inn, III Collected Papers, 79.
[23] Mr. Pound, ut supra.